STATE OF MICHIGAN

COURT OF APPEALS

WINDSOR CHARTER TOWNSHIP, a Michigan municipal corporation, Plaintiff-Appellee, v RICHARD W. REMSING, Defendant-Appellant.	UNPUBLISHED October 28, 2004 No. 249688 Eaton Circuit Court LC No. 02-001669-CZ

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant appeals by right the order granting plaintiff Windsor Charter Township summary disposition under MCR 2.116(C)(9) and MCR 2.116(C)(10). The trial court found that defendant violated the zoning ordinance of Windsor Charter Township by allowing non-occupant sales agents to work from his home-based real estate company and by exceeding the restrictions on advertising his home occupation. We affirm in part and reverse in part.

Defendant first argues that the trial court erred in granting the township's motion for summary disposition because real estate agents are not employees; they are independent contractors, and the wording of the ordinance demonstrates that the township recognized this distinction. Moreover, defendant asserts that all of his signs comply with the ordinance. We agree in part and disagree in part.

We review de novo a trial court's rulings on a motion for summary disposition, any constitutional issues raised, and the proper interpretation of an ordinance. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003); *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 608-609; 673 NW2d 111 (2003). MCR 2.116(C)(9) provides that a motion for summary disposition may be raised on the ground that the opposing party has failed to state a valid defense to the claim asserted against him. Summary disposition is proper if the defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery. *Allstate Ins Co v Morton*, 254 Mich App 418, 421 n 2; 657 NW2d 181 (2002). The motion tests the sufficiency of a defendant's pleadings alone, and all well-pled allegations are accepted as true. *Id*.; *Hazel Park v Potter*, 169 Mich App 714, 718; 426 NW2d 789 (1988). Under MCR 2.116(C)(10), a party may move for dismissal of a claim based on the assertion that there is no genuine issue with respect to any material fact and the moving party is

entitled to judgment or partial judgment as a matter of law. The motion tests the factual support for a claim, and when reviewing the motion, the court must consider all of the documentary evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Defendant argues that he should not be barred from allowing independent sales agents to work out of his home under his real estate broker's license because they are not "employees," as referred to in § 6.2.3 of the ordinance. See *Dimmitt-Rickoff-Bayer Real Estate Co v Finnegan*, 179 F2d 882, 888 (CA 8, 1950); see also MCL 418.161(1)(l) and MCL 418.119 (worker's compensation definition of "employee" and exclusion of real estate salespersons, respectively). To refute defendant's contentions, plaintiff argues that under the occupational code, MCL 339.101 *et seq*., real estate salespersons can reasonably be classified as "employees." But, the terms of one statute do not determine the meaning of another, especially if the statutes are not intended to effectuate a common result. *Louis A Demute, Inc v Michigan Employment Security Comm*, 339 Mich 713, 721-722; 64 NW2d 545 (1954). There is no conclusive reason why the terms of the worker's compensation act, the IRS code, or the occupational code should be read into the zoning ordinance of Windsor Charter Township. *Id*.

We recognize, however, that there is a difference between an "employee" and an "independent contractor"; thus, judicial construction is appropriate based on these differing interpretations. *Ross v State*, 255 Mich App 51, 55; 662 NW2d 36 (2003).

Clearly the spirit of the ordinance seeks to strike a balance between occupational activities and the preservation of the residential character of the neighborhood. If defendant's interpretation of the ordinances were correct, there would be absolutely no limit on the number of agents who could work out of defendant's home. As the trial court indicated, allowing such usage would lead to the absurd result of obliterating the distinction between commercial zoning districts, residential uses and home occupations. For purposes of enforcing the township's ordinance, the only reasonable way to interpret and apply the term "employee" is to deem any person who is a non-occupant working out of a home in the area as a "employee" within the meaning of the ordinance regardless of his "legally" defined position of employee or independent contractor, common-law or otherwise. That defendant employed a non-occupant of defendant's dwelling who worked in his dwelling is all the township needed to prove, and the worker here fell into that category. Although employees are often necessary for certain services and transactions, homeowners do not have an absolute right to a home-based occupation. See *Terrien v Zwit*, 467 Mich 56, 59; 648 NW2d 602 (2002) (upholding a restrictive covenant). The ordinance here permits employees as long as they also occupy the dwelling.

With regard to permissible signage for home occupations, we agree that defendant's "Sales Office" sign is permissible because it conforms to the restrictions set forth in Schedule A of the zoning ordinance. We disagree with defendant, however, that the "New Horizon" sign posted next to his driveway is permissible. It is not a "For Sale" sign being used to sell his home. It serves to advertise defendant's real estate business, through which he engages in both residential and commercial real estate transactions. As the trial court stated, although defendant would be allowed to display a sign to advertise his own home for sale, he is not allowed to display a sign that advertises the sale of "some houses or lots off in Timbuktu." Defendant is also allowed to display the "4729" sign because it merely displays defendant's home address as

permitted by the zoning ordinance. And defendant is also allowed to display the sign attached to his trailer because Schedule D of the zoning ordinance mandates, "[t]railer signs shall have owner's name and address clearly imprinted for identification purposes."

Defendant next argues that the ordinance is unconstitutionally vague because the ordinance fails to define the term "employee" and instead left it to the township supervisor's discretion to define the term. Furthermore, he asserts that the ordinance was not published as mandated by statute and that the trial court's interpretation of the ordinance violates his First Amendment right to engage in his home occupation. We disagree.

An ordinance is presumed constitutional and must be construed in a constitutional manner, unless its unconstitutionality is readily apparent. *Van Buren Charter Twp, supra* at 609. The party challenging the validity of an ordinance has the burden of proving a violation. *Id*. There is no merit to defendant's claim that mere ambiguity of a word renders an ordinance unconstitutional. Moreover, the ordinance properly designates the township supervisor as the official who shall administer and enforce the ordinance. MCL 125.294.

Zoning Ordinance No. 25 was properly adopted and amended in compliance with MCL 125.281a. As required, within fifteen days of the township board meetings at which the ordinance was adopted and amended, a notice was published in the Lansing State Journal. The notice stated that the ordinance would become effective on publication and indicated when and where the full text of the ordinance would be available for inspection. When adopted, the notice stated, "Windsor Charter Township Board of Trustees adopted the resolution to adopt Ordinance #25 . . . . This zoning ordinance will regulate the development and use of land in Windsor Charter Township, Eaton County, Michigan." When amended, the notice was addressed to all residents and property owners of Windsor Charter Township and provided a summary of the affected provisions.

We decline to address defendant's argument that the court's order violates his First Amendment right to free speech by precluding him from engaging in his home occupation for two reasons. First, defendant fails to cite *any* authority for this contention. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Second, there is no merit to defendant's claim. Defendant is free to conduct his business within the reasonable confines of the ordinance.

We also decline to address defendant's claim that the court improperly considered ex parte communications in rendering his decision. Defendant failed to identify this as an issue in his questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

We affirm the trial court's dismissal on all issues except the court's decision to prohibit the address and trailer signs. To the extent that the lower court's order prohibited the two signs, we reverse and remand for entry of an order in defendant's favor. We do not retain jurisdiction.

/s/ Jane E. Markey